

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF COLORADO

3  
4 Civil Action No. 17-CV-00210-RBJ

5 LIST INTERACTIVE LTD., d/b/a Uknight  
6 Interactive; and LEONARD S. LABRIOLA,

7 Plaintiffs,

8 vs.

9 KNIGHTS OF COLUMBUS, et al.,

10 Defendants.

11 -----  
12 REPORTER'S TRANSCRIPT  
13 Discovery Conference  
14 -----

14 Proceedings before the HONORABLE R. BROOKE JACKSON,  
15 Judge, United States District Court for the District of  
16 Colorado, commencing on the 12th day of September, 2017, in  
17 Courtroom A902, United States Courthouse, Denver, Colorado.

18 APPEARANCES

19 For the Plaintiffs:

20 JEFFREY S. VAIL, The Law Office of Jeff Vail, LLC, 5299 DTC  
21 Blvd., Ste. 1101, Greenwood Village, CO 80111

22 For the Defendants:

23 EDWARD GLEASON, Lewis Roca Rothgerber Christie, LLP, 90 South  
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25 JOY T. ALLEN WOLLER, Lewis Roca Rothgerber Christie, LLP, 1200  
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28 Proceedings reported by mechanical stenography;  
29 transcription produced via computer.

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2 (The proceedings commenced at 1:59 p.m.)

3 THE COURT: Hello.

4 MR. VAIL: Good afternoon. This is Jeff Vail calling  
5 on 17CV210. How are you?

6 THE COURT: Hi, Mr. Vail. 17CV210, List --

7 MR. VAIL: And that's List Interactive versus Knights  
8 of Columbus. I also have Ed Gleason and Joy Woller on the  
9 line for defendants.

10 THE COURT: Ah, yes. Well, thank you for helping me  
11 out there.

12 MS. WOLLER: Good afternoon, Your Honor.

13 MR. GLEASON: Good afternoon Your Honor.

14 THE COURT: So what's the problem today?

15 MR. VAIL: Today, Your Honor, we were hoping to take  
16 a few minutes of your time. There is a dispute between the  
17 parties as to what is open for discovery right now. If you  
18 recall back in our scheduling conference in March, the Court  
19 had temporarily deferred discovery on certain elements  
20 regarding Knights of Columbus membership numbers that are both  
21 relevant to the RICO claim, but the plaintiffs felt were  
22 irrelevant to motive to all of the other tortious acts and the  
23 breach of contract claim.

24 Now that the RICO claim has been ruled on, even  
25 though there's a pending motion to amend, the parties -- given

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1     that we only have until December 15th for fact discovery,  
2     plaintiffs are looking to now commence discovery on those  
3     points, and defendants object, and so we wanted to bring that  
4     issue to your attention and get a ruling as far as what is  
5     open for discovery at this time.

6                      THE COURT:    Okay.    And what's the defendants'  
7     position?    Why can't discovery proceed at this point?

8                      MR. GLEASON:    Your Honor, discovery can proceed on  
9     non-RICO issues, and it has been since the scheduling  
10    conference in March.    I have here a 30(b)(6) notice where we  
11    used five categories -- they are the five subjects in the  
12    30(b)(6) notice that I presented at the scheduling conference,  
13    and your ruling then was that discovery on these subjects was  
14    stayed pending the Court's ruling on the then pending RICO  
15    motion.

16                     Our position is, given that the RICO claim has been  
17    dismissed, that there should not be discovery on RICO issues.  
18    Certainly on contract issues, on trade secret issues, various  
19    issues in the case, and discovery can and is being conducted  
20    on those issues.    But as far as -- to be a bit more specific,  
21    the three subjects; one, it's number -- it's numbered number  
22    two in the 30(b)(6) notice, defendants' policies, accounting  
23    numbers, and recordkeeping regarding membership in the Knights  
24    of Columbus, and then there's further detail following that.  
25    We believe that that discovery -- those issues have nothing to

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1     do with this contract trade secret case.

2                      The next one is defendants' submissions to ratings  
3 agencies and state insurance regulators. Likewise. And then,  
4 thirdly, defendants' publications, contracts, obligations,  
5 marketing opinions, and press releases related to  
6 relationships with ratings agencies, A&M Best and Standard &  
7 Poor's. Likewise. There were two others that we think for  
8 other reasons that are not appropriate subjects for discovery.

9                      So we think the Court's deferral should continue  
10 unless and until there's a RICO claim in this case, and  
11 pending before Your Honor is a motion to amend to replace the  
12 dismissed RICO claim with another. We filed a response  
13 explaining why we do not think that should happen, but unless  
14 and until there's a RICO claim in this case, we do not believe  
15 there should be RICO discovery.

16                      THE COURT: So normally I would grant motions to  
17 amend without even thinking about it too much. What I don't  
18 understand here is the plaintiff files a RICO claim. The  
19 Court is put to the task of reviewing and deciding summary  
20 judgment motions. The Court decides the summary judgment  
21 motion, and the plaintiff thinks that that gives it open  
22 season to just amend its complaint to be more specific and  
23 come back and have a second bite at the apple. How does that  
24 work?

25                      MR. VAIL: Well, it was without prejudice leaving, in

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1    the Court's words, the door open to address the framework that  
2    the Court laid out and to replead the RICO claim, and that's  
3    what we have done here.    However, on this discovery issue  
4    plaintiffs' position is that the issues concerning membership  
5    numbers and the fraud that we allege was committed by the  
6    Knights of Columbus really goes to the motive of the Knights  
7    of Columbus to engage in all of the tortious actions including  
8    the six claims that have not been dismissed.

9                      So here I understand that defendants' position is  
10    that there is no current accepted RICO claim by the Court, but  
11    plaintiffs' position is that the discovery requested goes to  
12    the motive that makes it more likely that defendants engaged  
13    in these other tortious acts that remain in the six claims  
14    that have survived.

15                     THE COURT:    Well, that's what you say.    Explain that.  
16    I mean --

17                     MR. VAIL:    Well, Your Honor --

18                     THE COURT:    -- there was a contract, you say.    There  
19    was an oral contract, you say.    The contract was to give the  
20    plaintiff a big chunk of business from the Knights.    You say  
21    that what the Knights did was drag it out, drag it out, in the  
22    process acquiring trade secrets from the plaintiffs, and once  
23    they had the trade secrets that they wanted and needed, they  
24    kiboshed the contract and kept the trade secrets.    That's your  
25    case, setting aside --

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1 MR. VAIL: Your Honor, the key that is missing from  
2 that summary is that the reason that the Knights of Columbus  
3 -- these are plaintiffs' allegations -- decided to breach the  
4 contract and steal the trade secrets was that when they  
5 realized that widespread implementation of plaintiffs' system  
6 would lead to discovery of their fraud on membership numbers  
7 --

8 THE COURT: And what's your evidence of that?

9 MR. VAIL: Your Honor, the plaintiffs' system would  
10 connect every local council, the number of every local  
11 council's members, which ones are paying dues. It would  
12 identify which members are being double-counted when they move  
13 from state to state. It would identify specific numbers that  
14 are being claimed by specific councils, and we have specific  
15 testimony from individuals from the local councils that these  
16 numbers are inflated, that they're being told by the  
17 headquarters how much they have to report, not the actual  
18 numbers that they have, and they're being forced to pay dues  
19 based on these numbers that headquarters wants to hear, not  
20 the actual number of members that are there and paying dues  
21 for the council.

22 THE COURT: Yeah, but how do you connect that to your  
23 contract claim? That's the missing link. Explain that to me.

24 MR. VAIL: And, Your Honor, the key piece there is  
25 that when the defendants realized, based on Mr. Labriola's

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1 e-mails, that this would connect all of these members together  
2 and provide one transparent accounting of how many members are  
3 in each council and where they are, the defendants realized  
4 that that would reveal the fact that they've been dramatically  
5 inflating their membership numbers. It's not actually  
6 1.9 million, but closer to 1.4 million, and these numbers  
7 they've been reporting to the ratings agencies were false and  
8 have led to inflated ratings.

9                      THE COURT: Mr. Vail, you just -- you just keep  
10 repeating the same thing in different words. How do you  
11 connect this alleged concern about what this system would  
12 reveal to the world to the contract and trade secret issues?  
13 It sounds like an ipse dixit. You're just saying, well, yeah,  
14 just because, Judge. That's their motivation. That's why  
15 they did it. Says who?

16                      MR. VAIL: Well, Your Honor, the issue is when they  
17 realized that this would cause this to be revealed, that's the  
18 point where they decided to go back on their promises, that's  
19 the point when they decided to steal the trade secrets, and  
20 there's a very direct correlation in time between when they  
21 realized that, based on Mr. Labriola explaining this  
22 functionality of the system to them, when they suddenly  
23 decided to change from this is exactly what we want everybody  
24 in the Knights of Columbus to do to instead we're going to go  
25 away from this, we're going to breach this contract, and we're

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1        going to steal the functionality of the system so that we can  
2        recreate it in house to where we can control the information.

3                      THE COURT:    Okay.    So your only causal link is a  
4        coincidence of time.    What else do you have?

5                      MR. VAIL:    Your Honor, we also have the issue that  
6        everyone in the Knights of Columbus at senior leadership has  
7        been saying how much they like this, how this is exactly what  
8        they need, how the local council has been imploring leadership  
9        at headquarters to bring this system on board and make it  
10       widespread, and then as soon as they realized that this would  
11       be the result of that, they abruptly do an about-face and  
12       decide to cancel this and steal the trade secrets.

13                     THE COURT:    Yeah, but what I'm looking for is your  
14       smoking gun, your documents, your witness, your somebody, or  
15       are you just going on a fishing expedition here hoping you'll  
16       come up with something?

17                     MR. VAIL:    No, Your Honor.    We do not have a smoking  
18       gun e-mail that I can point to, but that is precisely why we  
19       need discovery on this point.    We have numerous individuals  
20       from local councils who have told Mr. Labriola this is exactly  
21       why they understood this has happened, but there's a  
22       difference between that conversation and having e-mails from  
23       the Knights of Columbus admitting to this internally.    We have  
24       not yet had the opportunity to conduct discovery on this topic  
25       because it was deferred previously, and so we haven't had a



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1 chance to go dig in and go find if there is some documentation  
2 inside the Knights of Columbus of that or if all we have to  
3 rely on is this --

4 THE COURT: Then why aren't you focusing on --  
5 focusing your discovery on that? What you're looking for is  
6 evidence that connects the decision to pull the plug to the  
7 concern about what your system might reveal. Why aren't you  
8 focusing the discovery on that? That is --

9 MR. VAIL: And that is exactly --

10 THE COURT: -- the people that made the decision to  
11 terminate the contract. In fact, that's -- that's not even  
12 prohibitive. You can take the deposition of anybody involved  
13 in the decision to terminate the contract and ask them  
14 questions about why they did it, right? That's not  
15 prohibited.

16 MR. VAIL: Absolutely, Your Honor. And even assuming  
17 that if we were to do that, take that discovery, even if they  
18 were to deny that any of this was any of the reason, that  
19 would not prevent the plaintiff in this case from presenting  
20 this as a motivation behind why this decision was made. Right  
21 now we're prevented from making the key point in that link,  
22 not why did you stop this contract, but establishing that  
23 there was, in fact, this fraud behind the scenes that required  
24 being covered up. And until we can establish that, it would  
25 be very difficult for plaintiffs to really force any of these

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1        witnesses into a position where they had to acknowledge yes,  
2        there was this fraud, but that had nothing at all to do with  
3        why we canceled this contract and stole these trade secrets.

4                      THE COURT:    Well, they're under oath.    They're  
5        subject to the penalties of perjury.    That's one little thing.

6                      MR. VAIL:    Your Honor -- yes, Your Honor, I agree,  
7        and I think that the key piece in the circumstantial chain for  
8        plaintiffs is when we can establish this fraud does exist, and  
9        we have a decent amount of evidence on that right now, but we  
10       haven't been able to take any discovery on that point.    The  
11       existence of the fraud with the termination and the timing of  
12       the termination I think would be critical to our case.

13                     THE COURT:    All right.    Then narrow down what you  
14       want to something very specific.    These three categories are  
15       very broad.

16                     MR. VAIL:    Your Honor, two issues.    We want -- well,  
17       three issues.    We want to be able to get membership  
18       information from headquarters.    We want to be able to get  
19       membership information and discussions about payment of dues  
20       on those members from the local council.    And we --

21                     THE COURT:    What's membership information, Mr. Vail?  
22       That's a very broad thing.    What is membership information?

23                     MR. VAIL:    Your Honor, it's just the individuals --  
24       the number of individuals and their names so we can actually  
25       line those up and see if they exist of who is claimed to and

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1        reported to be a member for a given council.

2                      THE COURT:    Members in what?    Members in what?

3                      MR. VAIL:    Members of the Knights of Columbus  
4        fraternity, Your Honor.    So they're a local council member and  
5        that they paid dues up to the state level and up to the  
6        national level.

7                      THE COURT:    Okay.    So you're talking about every Tom,  
8        Dick, and Harry who's affiliated with the Knights.    That would  
9        be the 40 or 50 people in Bozeman, Montana that belong to the  
10       Knights of Columbus lodge and every other --

11                     MR. VAIL:    Yes.    And frankly, just a spreadsheet that  
12        just lists by lodge this is the number, these are the names,  
13        so we can contact that lodge, for example, and say are these  
14        people actually members?    Do they actually pay dues, or have  
15        you been forced by headquarters to pay dues for them despite  
16        the fact that they are no longer paying dues to you?

17                     THE COURT:    Okay.    So you get this list of thousands  
18        of names.    Then how are you going to find out if they -- each  
19        of them pays dues?

20                     MR. VAIL:    We have numerous contacts with the  
21        individual local councils.    We would contact them and ask for  
22        -- they have what's called membership secretaries in each  
23        local council, and ask them for their internal records, are  
24        these the people you have as members, and have they, in fact,  
25        paid dues to you.

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1 THE COURT: Okay. So suppose you find that some of  
2 these thousands of members don't pay dues, what does that help  
3 you with?

4 MR. VAIL: Your Honor, what we allege and what I  
5 believe we will find is that between 20 to 40 percent of the  
6 members that the headquarters, Knights of Columbus  
7 Incorporated, requires the local councils to pay dues on are  
8 not paying dues to them, and that they're maintaining these  
9 people as members when they, in fact, are not to prop up their  
10 numbers so they can report those larger numbers to the  
11 insurance ratings agencies.

12 THE COURT: All right. So this is the single-most  
13 important thing you want?

14 MR. VAIL: Yes, Your Honor, that is.

15 THE COURT: All right. Mr. Gleason, what's your  
16 objection to that?

17 MR. GLEASON: Your Honor, that has nothing to do with  
18 this case.

19 THE COURT: Says who? Says who? You say.

20 MR. GLEASON: Says the pleadings. Says the pleadings  
21 that frame the issues in this case. As Your Honor has said  
22 very well, the issue in this case is the plaintiff claims an  
23 oral contract by which his service would be provided to the  
24 Knights of Columbus -- and Your Honor said it better than I'm  
25 saying it now -- and further claims that the Knights of

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1 Columbus decided not to proceed with the contract and instead  
2 to simply steal the trade secret. That's the -- that's what  
3 this case is about.

4                      Getting into a far-reaching expensive, intrusive  
5 inquisition and into the membership policies and practices of  
6 the Knights of Columbus has nothing to do with this contract  
7 issue. Mr. Vail says he's looking for a link, and he's  
8 looking to show -- his answer to that, as I hear, is that he's  
9 looking to show that -- that the membership information that  
10 he's seeking is rotten, and that we knew that, and we were  
11 afraid that the plaintiff was getting too close to it, and so  
12 that's the motive behind, I guess, breaching the oral  
13 contract. There's no evidence of that.

14                      And we are producing all sorts of discovery on the  
15 purported link here. We have produced a large volume of  
16 e-mails. That process is ongoing. We certainly are not  
17 holding back anything in terms of the contractual relationship  
18 between the parties, the course of whatever performance there  
19 was, discussions, why the Knights of Columbus did not choose  
20 to continue negotiations with the plaintiff, all that -- all  
21 that discovery is -- as you said earlier, has not been stayed,  
22 and it's being provided.

23                      But from the start -- as the Court's aware, from the  
24 start what the plaintiff has been seeking to do is to use this  
25 case as a platform to carry out this inquisition into the

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1       activities of Knights of Columbus having no bearing on this  
2       case, and to the extent the answer is -- originally the first  
3       answer to why this is pertinent was RICO. That's gone now.

4                The backup answer is motive. Having discovery about  
5       motive in a breach of contract case, in my experience anyway,  
6       is quite novel. We have a rule that imposes a proportionality  
7       requirement before discovery is conducted, and we're going to  
8       -- we're going to be off in the wilderness with all these  
9       membership issues. That's where the plaintiff wants to be,  
10      and it's not appropriate here.

11              MS. WOLLER: And, Your Honor, this is Joy Woller.

12              THE COURT: Are you representing the same client?

13              MS. WOLLER: Correct, yes.

14              THE COURT: Okay.

15              MS. WOLLER: Yes, Your Honor.

16              THE COURT: I'll just be content with one lawyer  
17       hammering at me today. Mr. Gleason's objection, as I've said  
18       on a few other occasions, not this case, reminds me of the old  
19       Perry Mason series on TV when the prosecutor would stand up  
20       and say, Objection, irrelevant, immaterial and impertinent,  
21       which means I object on all possible grounds. That's what  
22       Mr. Gleason has done. But the one objection that doesn't  
23       really ring true for me is the concept that this is going to  
24       be a highly expensive activity.

25              What I'm hearing, because I'm the one in the middle

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1    here, is Mr. Vail saying, Well, Judge, we just know it's -- we  
2    just know it in our hearts. We just know that there's a  
3    motive here that's really ugly. And I hear the other side  
4    saying, There's no evidence of this. Well, maybe there isn't.  
5    Maybe because the Knights won't let the evidence see the light  
6    of day. I don't know. I still think that the RICO thing ends  
7    up being a long diversion, an expensive diversion. But the  
8    specific information that I finally got Mr. Vail to focus on  
9    isn't an expensive diversion. It might be a diversion.

10                      The Court's order is that the defendant produce to  
11    the plaintiff what he calls membership information, meaning  
12    the members of the local councils, a spreadsheet, a list.  
13    You've got it. Obviously, you've got it. You know who your  
14    members are. And I want you to produce the membership as it  
15    exists as of this date. Not something that they might come up  
16    with tomorrow, but the membership as of this date. It's in  
17    your computer. You produce it to Mr. Vail, and we'll see if  
18    Mr. Vail can do something with it or not. I'm skeptical.

19                      But if what he says is true, and 20 to 40 percent of  
20    the members actually aren't even paying dues and are just  
21    phony names that are being kept on this system to shore up  
22    ratings, and if somehow he can connect that -- and he hasn't  
23    yet -- to the breach of this contract, then he's got  
24    something, and I'll let him have at least this much of a head  
25    start to see if he can do something with it.

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1 Is there anything else today?

2 MR. VAIL: No, Your Honor. Not from plaintiffs.

3 MR. GLEASON: No, Your Honor. Thank you.

4 THE COURT: All right. Good-bye.

5 (The proceedings were concluded at 2:22 p.m.)

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REPORTER'S CERTIFICATE

I, SARAH K. MITCHELL, Official Court Reporter for the United States District Court for the District of Colorado, a Registered Professional Reporter and Certified Realtime Reporter, do hereby certify that I reported by machine shorthand the proceedings contained herein at the time and place aforementioned and that the foregoing pages constitute a full, true and correct transcript.

Dated this 17th day of September, 2017.

/s/ Sarah K. Mitchell

SARAH K. MITCHELL  
Official Court Reporter  
Registered Professional Reporter  
Certified Realtime Reporter

Sarah K. Mitchell, RPR, CRR